

The Johannesburg Commercial Court

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Judge-President, Transvaal Provincial Division of the Supreme Court
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The idea of establishing a Commercial Court for Johannesburg initially occurred to me on reading an article by IW Schwartzman SC in the October 1990 edition of 3 *Consultus* 110 (entitled "Some reflections on practice at the English Bar"). Schwartzman practised in London for a few years. He thought that the motivation for the establishment of the London Commercial Court applied equally well to Johannesburg. I was subsequently also shown a memorandum written by attorney Mike Bennett in which he too recommended that such a court be set up in Johannesburg. I decided to explore the possibilities.

Committee

In order to assist me in considering these suggestions I set up an informal committee under my chairmanship comprised of a number of judges, two seniors of the Johannesburg Bar, two members of the Johannesburg Attorneys' Association, and

a representative of the Incorporated Law Society of the Transvaal. We met on a few occasions. I also sounded the Chief Justice, Minister of Justice, and the other judges-president on the question. The Incorporated Law Society thought that it might be of value if I were to study the running of the London Court at first hand, and thus to gain insight into its functioning. I did so in December 1992, accompanied by John Neaves, a council member of the Law Society. Amongst others I had useful discussions with J Steyn LJ (an expatriate South African) who, whilst a judge on the Queens Bench, served on the commercial court for several years. He thought that the commercial community of Johannesburg would benefit by the creation of a local commercial court. That was also Brian Doctor's view. Now practising in London, he has had some experience of the London Commercial Court. The senior Commercial Court judge, Saville, invited me to sit with him at a session of his court. Subsequently I had lengthy discussions

with him. Others to whom we spoke included the registrar of the London Commercial Court, and solicitors who regularly conduct litigation in it.

On my return to South Africa I decided to take the plunge, and, with the blessing of the Chief Justice and my fellow judges-president, I did so.

Practice direction

In England the Commercial Court was first established in 1893 by the introduction of order 73 in the British Rules of Court. To bring about an appropriate amendment to our rules of court creating a similar rule was likely to be a time-consuming process. My committee and I decided that a speedier method would be to issue a practice direction i.e. that all litigants in a pending action could apply to the Judge-President of the Transvaal for their case to be designated a commercial case, and thus agree to submit themselves to the disciplines and procedures

specified. The Judge-President could accede to the request, immediately assigning a judge to the case. We accordingly considered what the terms of the practice direction should be. The Minister of Justice moved the Justice Vote in Parliament on 13 April 1993, *inter alia* announcing the establishment of the Johannesburg Commercial Court in accordance with my written practice direction.

"Commercial action" is in paragraph 1 of the direction stated to be any trial action designated as such by the Judge-President.

Note:

For the guidance of practitioners, actions likely to be designated commercial matters, are those of a broadly commercial nature, such as those arising from or relating to commercial law and practice, mining and minerals, sale, letting and hiring, agency, banking and finance, suretyship, carriage, insurance, negotiable instruments, international trade and credit, building and engineering construction, arbitration, intellectual property, restraint of trade, unfair competition and other delicts committed in commercial context.

Consequences

One of the important consequences of such a designation is that any of

the parties may apply to the "nominated judge" for an order for directions. This judge may then "make such order as he deems appropriate to ensure the just, expeditious and satisfactory determination of the issue...". The discretion of the nominated judge is intended to be wide. Specific reference is made in paragraph 6 of the direction to a number of matters which the nominated judge may regulate. Of those the following merit special mention:

- The parties may be required to identify witnesses to fact, and to exchange their statements or summaries of their evidence. (This is an innovation which will hopefully have the effect that the parties will have a clear understanding of their adversaries' cases before trial. The advantages are self-evident.)
- A written statement of the issues in the case will be obligatory.
- The date of the trial may be determined by the judge, in consultation with the Registrar.

After issue of the practice direction I designated judges Streicher, Zulman, Schutz, Plewman, Myburgh and Cloete as the first judges of the Commercial Court. As in Great Britain they will be required, when not sitting in commercial actions, to do the normal work of Transvaal judges.

The main shortcoming of the practice direction is of course that, in the nature of things, it does not address the problem of the recalcitrant litigant, who uses the rules of procedure to gain time.

Benefits

On the positive side the main benefits are:

- The nominated judge will hopefully be able rapidly to iron out those procedural hiccoughs which may retard the disposal of the case.
- The parties should be able to come to grips on the real issues of the case at an early stage.
- The exchange of witnesses' statements may shorten trials; it may also lead to settlements when litigants are enabled to assess the strengths or weaknesses of the cases of their adversaries before trial.
- The litigants will have a reasonable assurance that the case will be heard on the date allocated to the case before the nominated judge.

Since the issue of my practice direction a number of litigants made application in terms thereof. Most of the applications were favourably considered. ■

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